IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No: 3130/2019

In the matter between:

ANELE LOBISHE **Plaintiff**

and

MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH, EASTERN CAPE **Defendant**

JUDGMENT

KOTZÉ AJ

Introduction

[1] The Plaintiff sues the Defendant alleging that because of the conduct of the Defendant's employees the Plaintiff has lost the use of his legs, rendering him wheelchair bound for the remainder of his life. The Plaintiff's claim is premised on the negligent or substandard medical care rendered to him by the Defendant's employees,

and therefore, it is alleged that the Defendant should be held liable for Plaintiff's damages. The matter comes before this court on trial.

[2] Concerning the conduct of the trial, the separation of issues was ordered by Makaula ADJP on 19 May 2023, which separated the issue liability (as paragraphs 1 to 19 of the particulars of claim) from the issue quantum (as paragraphs 20 to 24 of the particulars of claim). Within a month of the trial commencing, the Plaintiff gave notice of and filed amendments to the particulars of claim. At the commencement of the trial, certain further amendments (largely by reference to paragraph numbers) were further effected to both the particulars of claim and the plea. By reason of these amendments, the paragraphs referenced in the separation order required variation. The parties were in agreement that the variation was necessary, and accordingly, an order was made as set out later in the order. [1]

[3] At the commencement of the trial, counsel appearing for the Plaintiff, Ms Ayerst, handed up a document titled "*common cause facts arising from the agreement reached and the pleadings*", explaining that the document sets out exactly that. Counsel appearing for the Defendant, Mr Dala, had no objection to the document being handed in and marked as exhibit "A". I am grateful to Ms Ayerst in preparing same in assistance to the court, and I commend both counsel for the approach adopted.

[4] The duration of the trial was short and efficient with two witnesses being called by the Plaintiff (and which later turned out to be the only two witnesses): the first was Professor Vlok, a Neurosurgeon, and the second was the Plaintiff himself.

The evidence

[5] The material facts of the matter are, as is evident from exhibit "A" above, almost all common cause or stand uncontroverted.

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[1] *NCS Resins (Pty) Ltd v Allan and Others* (2708/2016) [2022] ZAECQBHC 25 (30 August 2022) at para 8.

5.1. During 2009, the Plaintiff was involved in a motor vehicle accident during which he suffered no serious injuries. Following the accident, he considered a claim against the Road Accident Fund but because his injuries were not considered serious enough, he did not persist with his claim. Following the motor vehicle accident, the Plaintiff proceeded with life as normal, playing rugby and working as a baker at Spar. Fast forward to 2015, the Plaintiff started experiencing weakness in both legs and back pain. He commenced with physiotherapy at Zweni Clinic.

5.2. The Plaintiff was later referred to Provincial Hospital in Gqeberha where he was admitted on 27 March 2017. By the time of his admission the Plaintiff was walking with the assistance of a single crutch. At Provincial Hospital the Plaintiff was diagnosed with a T11/T12 disc herniation. He was then referred to Livingstone Hospital with weakness in both legs and back pain. He was still walking with the assistance of his crutch. On 4 April 2017 the Plaintiff's surgery was delayed due to the employees of the Defendant requiring further assessments and/or opinions for optimal operational procedures or options. On 12 April 2017 the Plaintiff underwent a T11/T12 posterior laminectomy and fusion.

5.3. Although I will deal with the specifics of the medical intervention with reference to the joint minutes of the parties' experts and Professor Vlok's testimony, it would suffice for the time being to state that shortly after his operation the Plaintiff had complete loss of motor function of both lower limbs, whereafter, a computed tomography scan (also called a "CT scan") was performed which indicated misplacement of the right sided pedicle screws during the Plaintiff's operation. On 15 April 2017 it was noted that the Plaintiff was unable to feel or move his legs. On 16 April 2017 it was recorded that the Plaintiff had no perianal sensation.

[6] Other than the above common cause facts, in particular those dealing with his admissions and medical procedures, the Plaintiff testified that he was walking with the aid of one crutch at the time of his admission to both Provincial Hospital and Livingstone Hospital, and that since his operation, he had never walked again and presently uses a wheelchair. The evidence of the Plaintiff was not placed in dispute during cross-examination, nor was any version put to him. My observation of the Plaintiff during his testimony was that he was honest, and at certain times, seemed embarrassed for his present state (which I might add, was wheelchair bound during the entire court proceedings). Absent any challenge under cross-examination to indicate otherwise, I find the Plaintiff to have been a credible and reliable witness.

[7] Turning then to the specifics of the medical procedures undertaken, the Plaintiff called Professor Vlok, who is a Neurosurgeon and the current President of the South African Spine Society, as well as the President of the College of Neuro-Surgeons of South Africa which, so I understood him, is the universal examinations body in South Africa. In his view, he considers himself an expert in the field of neurosurgery. At the start of Professor Vlok's testimony, Mr Dala informed the court that the Defendant does not dispute Professor Vlok's credentials. Stated otherwise, and subject to the court accepting Professor Vlok's competence to testify on the subject at hand, the Defendant had no objection thereto. This court accepts that Professor Vlok is a suitably qualified expert, both competent and able to assist this court by giving opinion evidence.

[8] Before turning to Professor Vlok's evidence, I deal with the joint minute singed by the parties' respective experts, Professor Vlok on the one side, and Dr Edelstein (Orthopaedic Surgeon), on the other. This minute is dated 8 March 2024 and was handed in during the evidence of Professor Vlok without objection and was marked as exhibit "C".

[9] The joint minute records the agreement between the above experts as follows-

9.1. The Plaintiff presented with symptoms and signs of myelopathy that was confirmed on magnetic resonance imaging (MRI) on 29 March 2017 as being due to cord compression from a prolapsed thoracic disc. The proposed surgery by the employees of the Defendant, to relieve pressure on the spine, was correct and was appropriate to address the disc herniation.

9.2. They agreed that screw pedicle fixation was indicated and removal of the disc required facetectomy that then required stabilisation, and that if that was not done, back pain could result from the instability.

9.3. It was further agreed that doing surgery for herniated thoracic discs is much more difficult and has a much higher risk of neurological complications than lumbar or cervical disc surgery as the space that the surgeon would have to work in around the spinal cord would be very limited in that area. Because of that, they agreed that the technical surgical expertise to do surgery in that area of the spine is of a higher standard than in the lumbar spine. Although they further agreed that surgery for thoracic disc herniations rarely indicated and that gaining experience in such surgery is rare and usually limited to specialist referral centres, a specialist surgeon with average experience of spinal surgery would be able to glean appropriate advice from colleagues more experienced in avoiding the pitfalls of causing and recognising complications of which further neurological compromise and most especially paralysis is the most important.

9.4. Although listing a total of four most likely neurological complications, relevant to the present case, they agreed that one such complication would occur in the event of cord transection as a result of incorrect screw placement, which they further agreed, is avoidable with careful surgical technique assisted by biplanar x-ray imaging as the screws are inserted.

9.5. They also agreed that a precipitous drop in blood pressure would be indicative of cord damage and when this occurs immediate cessation of screw implantation must occur and imaging done.

9.6. They agreed that immediately post-operatively a patient must be assessed for leg movement and sensation, and they agreed that there was no documentary evidence that the Plaintiff was assessed for lower limb neurological fall-out either immediately post-operatively or in the ICU where his Glasgow Coma Scale (GCS) was rated 15/15 (which indicated that the Plaintiff was aware and awake).

[10] Most materially from the joint minute, the experts agreed, in their conclusion, that:

10.1. the cause of the paralysis of the Plaintiff was as a result of incorrect screw placement with direct damage to the spinal cord, and that this could and even should have been avoided, with biplanar imaging;

10.2. there is no evidence that appropriate steps were taken intra-operatively or immediately post-operatively to recognise the complication of neurological damage;

10.3. even if immediate recognition of neurological damage was found, the removal of the (misplaced) pedicle screws would have made no difference;

10.4. the Plaintiff was already severely disabled due to neurological compromise on presentation and that successful surgery would probably have halted deterioration but that no improvement could be guaranteed; and

10.5. even if the surgery was done expertly there was a significant higher risk than in the lumbar spine of worsened neurological compromise (including possibly paralysis) for the reasons I have set out above.

[11] Although the joint minute records no disagreement, the conclusions require explanation in order to serve as assistance to the court in concluding on the issue of liability. For that reason, the testimony of Professor Vlok was necessary and could shed important light on the experts' joint conclusions. His testimony and expert opinion was not challenged by the Defendant. Professor Vlok testified as follows –

11.1. He compiled a report dated 20 September 2018. At the time of his report, he did not have, in his view being a key part, images from a CT scan performed on the Plaintiff after his complication arose. These images he only received afterwards. He relied on the medical records of the Plaintiff kept by the Defendant.

11.2. In his opinion, the motor vehicle accident of the Plaintiff in 2009, although relevant as medical history, would not have played a role because of the manner in which the Plaintiff was functioning after the accident, and accordingly, there is no link between the accident and his presenting problems in 2017.

11.3. As to the Plaintiff's presenting problems, there was a compression on the spinal cord of the Plaintiff by reason of a disk herniation which had to be removed to alleviate the symptoms experienced by the Plaintiff, and to alleviate that compression would be quite precarious because of its location; anatomically the spinal cord ends typically at the level of L1/L2, which is in the thoracic spine, just above the lower part of the thoracic spine. Effectively, this means that the problem areas in case concerned the spinal cord as opposed to the more common disc herniations which

occur in the lumbar spine. The relevance of this, so he explained, is the significant consequence for paralysis.

11.4. He further explained that in the thoracic spine, surgeries are different because the spinal cord cannot be moved, and during medical intervention, there is the risk of mechanical injury because of actual movement or the risk of vascular injury. Planning for an operation should be carefully done so to remove a mass or a compression without disturbing the cord.

11.5. There are two typical ways to deal with thoracic disc herniation, the first being to enter from the side of the body, proceeding through the chest wall and moving the lung, which is more complicated, the second is to do so directly from the posterior or the back.

11.6. He explained the procedure as follows: "*You dissect the tissues out of the way. You create space by drilling around the spinal cord, the bone away. You get access directly visualising the disc herniation and then coax it out without mobilising the cord. So, by doing this drilling, you typically take away the joint which links the two vertebra and then you have to fuse them. So, you create an instability to access the compression and therefore you have to do what we call typically pedicular fixation. So, screws down the pedicels of the vertebrae to hold them. These screws you connect with a rod and it then stabilises that instability that you have created by drilling out the joint to access the herniation"*.

11.7. If such a surgery is successful, so he went further, it would stop deterioration with some expectation of improvement. Concerning the risk of paralysis, he explained that because one would be working with the spinal cord, paralysis would always be a consideration, however, if the procedure is undertaken correctly, one would estimate a one percent if

not less than that chance of paralysis. In summary, it is his opinion that the risk is very small.

11.8. In his observation of the medical records, he found no surgical notes, which typically is made by surgeons, and absent these, he was uncertain in which sequence the surgeon performed the operation. Although that is so, his observations of the post-operative CT scan is that two of the screws, both on the right hand side, were placed directly through the spinal cord, where they were intended to go through the pedicles. In his testimony he referred to images forming part of the report of Dr Edelstein for the Defendant, which evidence was not objected to. These images, as page 16 of Dr Edelstein's report, was during closing arguments (mostly for identification sake) marked as exhibit "D".

11.9. With reference to the images, he testified that, as they appear on that page, the first row of images show that the left-hand screws were misplaced in that both the screws on that side violated the pedicle in the sense that they were not completely within the pedicle but pierced the spinal canal housing the spinal cord. Simply stated, the screws appearing on the left-hand side were inserted skew. (Although in this judgment and during testimony reference was made to left and right as they appear on the images, in reality, Dr Vlok testified that that which appears to be on the left-hand side on the images are in reality the right-hand side. In other words, it was in reality the misplacement of the right pedicle screws that he testified about. The images are therefore inverted.)

11.10. He further explained that the images (as page 16 of Dr Edelstein's report) and numbered as image 53 and image 81, respectively, constituted sequential images of the different levels. The relevance of this was that the screws appearing on the left-hand side in each of the images concerned both levels.

11.11. He further testified that his report was prepared without sight of the images and based solely on reports of misplaced screws from the clinical notes. Importantly, he further explained that typically if a screw is misplaced, it can deviate slightly from its course or it might breach the medial wall of the spinal canal, which is usually referred to as a ‘misplacement’ and it happens in the thoracic spine because the pedicle itself is not a circular tube but more elongated. Therefore, he further explained, the literature will report fairly high rates of misplacement, about 10% in some cases. Because he did not have the images at the time of his report, he initially worked on the assumption that the screws were misplaced in that particular context of the word ‘misplacement’ and may have occasioned a medial breach. Based on this assumption, his initial criticism was directed at the timeline between conclusion of the operation and the moment it was noticed that Plaintiff had no movement in his legs.

11.12. In his evidence he further clarified that although in his initial report he described the misplacement as a ‘complication’ rather than ‘negligent’, he did conclude in his report that he would only comment on the appropriateness of the surgery once he has observed images and the position of the misplaced screws. Having now considered the images afterwards, his opinion is that the misplacement was rather a matter of negligence than a complication. His reasoning for this is the fact that to place the screws completely through the canal and completely miss the pedicle, taking account of several aids available to establish whether the screw is correctly placed, amounted to negligence.

11.13. In further explanation of the procedure, he testified that there are clinical landmarks consistent with all spines which serve as guides to identify the likely entry points where the screws would be inserted. These points are then further identified by using a C-arm for imaging (which is standard

equipment) and the entry points are then more accurately identified. He explained that a screw misplaced using the procedure for placement, would be described in the literature as a 'deviation' causing a small breach through the pedicle.

11.14. In elaboration of the procedure referred to earlier, in summary, Professor Vlok testified as follows:

A VLOK: … You have now got the x-ray. The procedure to place the screws are standard. They are described in our text books. So, you break the bone with a small little sharp instrument. You just crack the outside bone.

…

So the bone is – the vertebra, the outside layer is hard. Inside is softer bone. So you want to break the hard layer with a small sharp instrument.

…

Then we have got a second instrument called an awl, A-W-L, that you gently then advance. This advancement with the awl can occur, depends on the skill of the surgeon. If you have done many of them, and you are comfortable with the trajectories, but otherwise under imaging you can very safely follow it down the pedicle. You get a similar picture to what is the bottom picture here on x-rays and you can see whether you have violated the bone or not. So this then usually you have some resistance. You go through into the bone and you calculate the length beforehand, how long you want the screws. You measure and then once you have removed this awl [interjection]

…

COURT: The awl is used to make the guiding of the hole?

A VLOK: Yes, it drills a guide hole for the screw.

COURT: Okay, it is not the insertion of the screws yet?

A VLOK: Not yet.

COURT: Alright. I do not want to forego your testimony but just assist me here. In this process with the awl, can you observe under imagery? Is that live imagery?

A VLOK: Yes, correct.

COURT: In other words, you can be inserting with the awl, the guide hole, and you can adapt or change the direction at which you do so?

A VLOK: Absolutely.

COURT: So, it is a moving, a continuous process? It is not a single commitment if you have marked it wrong, if you have got a [interjection]

…

A VLOK: Ja, you have got a constant feedback. It depends how much. It is a still image per time but obviously you advance further, you can screen. You can see: "Am I angled correctly?" and you can do this imaging in the, what we call the AP plane. So, as we see in the bottom picture, or from the side. So to correct all the, to check for all the variables.

…

The third part is once you have done the awl, you will remove it and then we have a small ball-tipped probe that you advance down that drilled hole and you can feel. It is called a 'feeler' or a probe. You can feel all the borders of the pedicle, to ensure that you are in the bony canal. So these three steps effectively, they are in our text books. This is how you place a pedicle screw safely.

11.15. Turning then to the facts of the Plaintiff and the insertion of the pedicle screws, he testified:

A VLOK: … Okay, now the screws in question here are – it is not that they started correctly and deviated. They are off to the side. So they are about a half a centimetre off the starting point, going in a trajectory that is not – not – not within the pedicle and going straight through the canal. So, that is why and again the word 'gross' is not quantified in any sense but it is far

from what you would have if you had an error that occurred with you in terms of angulation or in terms of depth for example. That is what we speak about as a complication, as a misplaced screw. But in this case it is so far off the pedicle that I believe that it is not done in a reasonable fashion.

COURT: I am really sorry to interject the whole time, so that I understand.

A VLOK: I apologise.

COURT: You were testifying about the feedback.

A VLOK: Yes.

COURT: Now from general handyman experience of my own, it is similar to boring into a piece of wood, not knowing how thick it is but with the feedback, you immediately feel the moment you have pierced through the board. Is it [interjection]

A VLOK: It is exactly the same.

COURT: Is that what you mean with feedback?

A VLOK: It is exactly the same.

…

A VLOK: So to conclude your question on complication versus negligence, I just feel like you have the C-arm available, the imagining, the x-rays, and you have the clinical technique, which is a sound technique then to guide you and between the two of those, you reasonably should not be placing the screw in that space where it ended up, two of the screws.

MS AYERST: So Professor, if I understand your evidence correctly, although you do not like the word 'gross', but you would classify this action and this operation and the way it was performed with regard to the right side pedicles, as negligence and not complication?

A VLOK: I do. The placement of the pedicle screw component of it, I have no clinical notes to reflect on the strategy to remove the disc herniation, how that was taken out.

11.16. Following the above, and most importantly, he testified that the misplacement of the pedicle screws was the cause of the Plaintiff's paralysis. He also confirmed the correctness of his report as further corrected and supplemented by his evidence, having seen the images.

11.17. With reference to the joint minute between the parties' experts and the mention of a precipitous drop in blood pressure, he testified that it would have been indicative of cord damage and that this would have alerted, considering the significant drop, the surgical team to immediately seize screw implantation and to undertake imaging.

11.18. Concerning the ultimate conclusion between the experts in their joint minute, he testified as follows:

> *MS AYERST: And then with point five, do I understand you correctly that this is where you were talking about the complication previously in your report, where you said a misplacement of a minor breach is not necessarily negligence. It is a complication but a gross misplacement or mispositioning is negligence?*
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> *A VLOK: Correct. We, the term 'discectomy', when you have a disc herniation, it is a rare finding in the thoracic spine, where the spinal cord is involved. So it is easily misconstrued with the lumbar discectomy which is not an easy operation but that does not carry the risk. So, if you talk about paralysis as an entity, in the lumbar spine you will have 0.001 chance because there is no cord. It is so extraordinarily unlikely to have a paralysis event whereas the moment you are with the thoracic spine, that comes to play even though that is low. That is still 1 percent or as I mentioned before, particularly in the lower thoracic spine. So the difference between the two is great but both of them are – the risk is still quite low, very low, and highly improbable if done right.*

[12] Once again, the testimony of Professor Vlok was not challenged, nor did the Defendant call Dr Edelstein or any other expert to rebut or otherwise explain an alternative probable conclusion than that expressed by Professor Vlok.

The legal principles

[13] Considering the common cause facts, the unchallenged testimonies of the Plaintiff and Professor Vlok, and to the experts' joint minute, there is no need to traverse all the legal principles relevant to the Plaintiff's claim.

[14] The Plaintiff contends that, but for the misplacement of the right-sided pedicle screws which breached the spinal canal, the Plaintiff would not have been rendered a paraplegic and confined to a wheelchair for the remainder of his life.

[15] The above to an extent resembles that said by the Constitutional Court in *Oppelt v Department of Health, Western Cape*: [2]

> *A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' test. Legal causation must be established on a balance of probabilities. The vital question is whether, as a matter of probability, the applicant's paralysis would not have occurred or been rendered permanent had the reduction procedure been performed promptly and within a time that was reasonably likely to prevent permanent quadriplegia.*

[16] The full court of this division has held, concerning causation, that: [3]

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[2] *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at para 35 (also reported as 2015 (12) BCLR 1471 (CC).
[3] *JA obo Da v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) at paras 48-49.

The most commonly employed technique for determining factual causation is the 'but for' test. This means that the appellant had to prove on a balance of probabilities that, 'but for' the negligent actions or omissions of the respondent's employees, the injury would not have occurred. The test for factual causation was explained simply and precisely by Lord Denning in Cork v Kirby MacLean Ltd:

> *'(I)f you can say that the damage would not have happened BUT FOR a particular fault, then that is in fact the cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not the cause of the damage.'*

…

The test need not be applied rigidly. It also does not require factual causation to be determined with scientific precision. The reason for this is that factual causation is a requirement of the substantive law for delictual liability, and its existence is determined by the rules of evidence, more particularly, the legal standard set by the burden of proof.

[17] A practical example of the above exposition can be found in *Life Healthcare Group (Pty) Ltd v Suliman*, where the Supreme Court of Appeal phrased the question on factual causation as '*[w]as it more probable than not that the birth injuries suffered by the baby could have been avoided if Dr Suliman had attended the hospital earlier, after the 18h35 phone call?'* [4] *In casu*, guided by the conclusions of the joint minute, that can be rephrased as '*was it more probable than not that the paralysis of the Plaintiff could have been avoided if the placement of the right-sided pedicle screws were performed with biplanar imaging?*'

[18] The above highlights that it is a matter of probability, not certainty:

> *…the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in*

[4] *Life Healthcare Group (Pty) Ltd v Suliman* 2019 (2) SA 185 (SCA) at para 16.

which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty. [5]

[19] In *Goliath v MEC for Health, Eastern Cape*, it was held that: [6]

The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant's negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (Van Wyk v Lewis 1924 AD 438 at 444). A surgeon is in no different a position to any other professional person (Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 488C). It has been pointed out that a 'medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' (Mitchell v Dixon 1914 AD 519 at 525). As Scott J put it in Castell v De Greef 1993 (3) SA 501 (C) at 512A – B, '(t)he test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field' (cited with approval in Buthelezi v Ndaba 2013 (5) SA 437 (SCA) para 15).

[20] The enquiry into negligence concerns a consideration of the reasonable foreseeability and the reasonable preventability of damage and failure to act

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[5] *ZA v Smith and Another* 2015 (4) SA 574 (SCA) at para 30.
[6] *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at para 8.

accordingly, and what is or is not reasonably foreseeable in a particular case, is determined by the facts of the case. [7]

[21] Concerning the foreseeability consideration in determining negligence, the Supreme Court of Appeal said: [8]

> *The words emphasized in the passage in Country Cloud just quoted thus stress the need to ensure that wrongfulness and negligence are recognised as separate and discrete elements as, if they are not and negligence is elevated to the determining factor, they would be conflated. Should that occur, the safeguard of regarding wrongfulness as a separate requirement would be lost.*
>
> *…*
>
> *In order to avoid such confusion and the conflation of the two elements, this court has now determined that foreseeability of harm, a critical requirement of negligence, should find no place in the inquiry into wrongfulness — see Country Cloud Trading CC v MEC, Department of G Infrastructure Development 2014 (2) SA 214 (SCA) para 27, as read with MTO Forestry para 18 where this court said:*
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> > *'It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability.*'

[22] A plaintiff and his experts are entitled to rely upon the medical records kept by his defendant (as the medical practitioner or custodian thereof) to prove his case and for his

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[7] *SN obo ON v MEC for Health: Eastern Cape* (277/2023) [2025] ZASCA 36 (2 April 2025) at para 20; *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

[8] *Stedall and Another v Aspeling and Another* 2018 (2) SA 75 (SCA) at paras 13-14.

experts to form the factual basis for their opinions, notwithstanding the hearsay nature of the records and that the authors thereof had not been called to testify. [9]

Application of the legal principles to the facts

[23] The unchallenged testimony of the Plaintiff was that he was ambulating on a crutch immediately prior to the surgery on 12 April 2017. It was therefore not disputed that the Plaintiff had the use of his lower limbs.

[24] The evidence of Professor Vlok (as well as joint minute) indicates that the likelihood of paralysis resulting from the surgery is commonly known. In fact, the Plaintiff's surgery was delayed on 4 April 2017 in order to allow the Defendant to conduct further assessments and obtain opinions for the optimal of operational procedures or options to be considered. It is therefore reasonable to accept that the Defendant knew of the general risk of paralysis before the surgery was performed.

[25] That said, Professor Vlok testified that although the risk of paralysis was a likely consequence, the probability of it arising would be relatively low, if the correct procedure is followed assisted by biplanar imaging.

[26] Having seen the images of the misplacement of the right-sided pedicle screws, Professor Vlok unequivocally testified that in his view the misplacement was not a mere complication but amounted to a gross or negligent procedure. In support of this, he had testified that the procedure to undertake is commonly known and found in literature and textbooks, and despite that and the availability of standard imaging machinery (such as a C-Arm) which could and should have avoided a misplacement (as was the agreed conclusion by the joint experts), the screws were grossly misplaced.

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[9] *HN v MEC for Health , KwaZulu Natal* [2018] ZAKZPHC 8 (4 April 2018) (unreported judgment by Koen J) at para 6-9 ; *AM obo LM v Member of the Executive Council for Health , Eastern Cape Province* 2024 (1) SA 413 (ECB) at paras 7 & 17.

[27] Professor Vlok's evidence furthermore clarified that the right-sided pedicle screws for both levels (that is, T11 and T12), were misplaced. Simply put, it is not a case of only one of the four screws in total being misplaced, but of two on the same side.

[28] To make matters worse, it was also undisputed that there were no surgical notes from which it could have been possible to determine the procedure undertaken in the Plaintiff's operation and the step-by-step methodology adopted, less so, was there an attempt by the Defendant, in the absence of such medical records, to explain what procedure was undertaken or exactly what transpired during the operation.

[29] The experts agreed in the joint minute that "*the cause of the paralysis was as a result of incorrect screw placement with direct damage to the spinal cord and that this could and even should have been avoided with biplanar imaging*" and furthermore, that "*there is no evidence that appropriate steps were taken intraoperatively or immediately post-operatively to recognise the complication of neurological damage*".

[30] In light of the general risk of paralysis and its result should the operation be performed grossly or negligently, it is beyond doubt that harm to the Plaintiff was foreseeable. In fact, the initial delay of the operation serves as proof that the Defendant recognised these risks.

[31] I therefore agree with the opinion by Professor Vlok (and the joint minute) and find that the insertion or misplacement of the right-sided pedicle screws by the Defendant was negligent.

[32] Having come to such a finding, the quoted portions of the joint minutes of the experts, supplemented by the testimony of Professor Vlok, undoubtedly proves that the factual cause of the Plaintiff's paralysis was the misplacement of the right-sided pedicle screws. I am furthermore satisfied that this cause is sufficiently close to the paralysis of the Plaintiff.

[33] Accordingly, the Court finds that the placement of the right-sided pedicle screws was the cause of the Plaintiff's paralysis and loss of his lower limbs, rendering him wheelchair bound for the remainder of his life.

Costs and the draft order

[34] As part of her closing arguments, Ms Ayerst presented a draft order and submitted that such would be the appropriate order, should the court find for the Plaintiff. This allowed the Defendant, in fairness, the opportunity to considered and present argument on an appropriate costs order. [10] That is what the Defendant did.

[35] During back-and-forth argument concerning the issue of costs set out in the draft order, Mr Dala for the Defendant's main submissions, should I find favour with the draft order, were that –

35.1. the draft order proposes interest on legal costs "*at the legal rate from a date 14 days after allocator and/or agreement to date of payment*". He submitted that a more reasonable time would be a date "30 days" after allocatur or agreement. Ms Ayerst took no serious issue with such submission (at least not in the larger scheme of things, so I understood).

35.2. the draft order proposes "*the costs of the hearing on 22 and 23 January 2025 including Counsel's day fees*". The draft order is therefore a quantification of the Plaintiff's costs (as opposed to only a qualification), in other words, reference to 'Counsel's day fee' would effectively usurp the powers of the taxing master by imposing a 'day fee' leaving only to the taxing master the discretion to determine the reasonable allowable rate of the 'day fee'.

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[10] *Donaldson v Seaward* 1958 (2) SA 198 (O) at 200A ; *Letsoale v Road Accident Fund and Other Similar Matters* 2023 (6) SA 533 (GP) at para 60.

35.3. the draft order provides for "*the costs of preparing for consultations together with the costs of consultations between Plaintiff's legal representatives, Plaintiff and Plaintiff's witnesses*" and for "*the costs of preparing for trial and argument*". I understood the objection thereto to be that those costs must be proven first, which is what taxation is for.

[36] In rebuttal to those submissions, Ms Ayerst submitted that the draft order takes the form of the usual orders granted in matters such as the present. Furthermore, she submitted that a clearer defined order, such as the present, assists taxation and does not necessarily usurp the discretion or powers of the taxing master.

[37] It should be noted that Mr Dala took no issue with paragraph 2.4 of the draft order, which provides for "*the reservation fees, if any, together with the qualifying fees, if any, of the Plaintiff's expert witness, Professor Vlok together with the travelling costs and accommodation costs, if any, in respect of the abovementioned witness*". It can only be understood that such was the case considering that Professor Vlok is not from Gqeberha (he testified that he is the Head of Department of Neuro-Surgery at Tygerberg Hospital, as well as Head of Division of Neuro-Surgery at the University of Stellenbosch), and that he was of great assistance to the court in explaining the general surgical procedure undertaken and providing context to the agreed conclusions in the joint minute, in the context of the procedure explained.

[38] It has been held that it is for the taxing master to determine what attendances and expenses should be allowed as being reasonably necessary for the conduct of the litigation, and that while it is permissible and often useful for the court in its judgment to express its views on costs-related issues for the assistance or guidance of the taxing master, judges should not usurp the latter's role and functions. [11]

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[11] *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC) at para 82 (a judgment by the full court of the Western Cape Division).

[39] The full court of this division has held as follows: [12]

Cilliers in Law of Costs said the following of the discretion vested in a taxing master:

> *'The discretion vested in the taxing master is to allow (all) costs, charges and expenses as appear to him to have been necessary or proper, not those which may objectively attain such qualities. His opinion must relate to all costs reasonably incurred by the litigant, which imports a value judgment as to what is reasonable. Moreover, the words reasonable and in the opinion of the taxing master that occurred in the tariff appended to rule 70 imported a judgment not referable to objectively ascertainable qualities in the items of a bill in question. The discretion to decide what costs have been necessarily or properly incurred is given to the taxing master and not to the court. It is now a well-established rule that in regard to quantum, both as to the qualifying fees for medical expert witnesses, other expert witnesses, and counsel's fees, the decision of the taxing master is a discretionary one.*
>
> *The taxing master has a discretion to allow, reduce or reject items in a bill of costs. This discretion must be exercised judicially in the sense that he or she must act reasonably, justly and on the basis of sound principles with due regard to all the circumstances of the case. Where the discretion is not so exercised, the decision will be subject to review. (City of Cape Town v Arun Property Development (Pty) Ltd 2009 (5) SA 226 (C) [at] 232.) In addition, even where the discretion has been exercised properly, a court on review will be entitled to interfere where the decision is based on a misinterpretation of the law or on a misconception as to the facts and circumstances, or as to the practice of the court.*

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[12] *Trollip v Taxing Mistress, High Court and Others* 2018 (6) SA 292 (ECG) at para 17.

> *The taxing master's discretion is wide, but not unfettered. In exercising it the taxing master must properly consider and assess all the relevant facts and circumstances relating to the particular item concerned. The discretion is not properly exercised if such facts or circumstances are ignored or misconstrued.*

[40] Returning to the opposing submissions on the costs proposed in the draft order, I am persuaded by Mr Dala's submission that although the court has a broad discretion to grant costs, quantification of these costs is the discretion and function of the taxing master. Therefore, any specific reference to "day fee" should best be left for the taxing master. That said, this court is however in a position to grant the costs of counsel, not only having observed her on brief, but also having benefitted from her involvement in the trial, and can therefore make an order allowing such related costs.

[41] Concerning the issue of preparations for and attendances to consultations, and although this item might also be an item to be considered and proven by Plaintiff at taxation, I see no harm in granting such order if it is qualified by the words "if any" at the end thereof. The same can be said of the costs of preparing for trial and argument. In the latter regard, Ms Ayerst presented heads of argument which were evidently carefully drafted and served as great help to the court.

[42] Finally, concerning the issue of the costs and fees of Professor Vlok, and although not objected to by the Defendant, it seems as if such an order would be necessary in order for the Plaintiff to advance same at taxation. [13] Therefore, with further consideration of what is said of the testimony of Professor Vlok in this judgment,

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[13] Rule 70, Tariff of Fees, Tariff D, Item 5: "*Testimony: Fair and reasonable charges and expenses which in the opinion of the taxing officer were duly incurred in the procurement of the evidence and the attendance of witnesses whose witness fees have been allowed on taxation: Provided that the preparation fees of a witness shall not be allowed without an order of the court or the consent of all interested parties" ; cf Erasmus: Superior Court Practice*, Volume 2, Rule 70: "D – Miscellaneous", "Item 5".

an order as sought above would issue. In doing so, I am mindful of the necessary distinctions and limitations on this topic. [14]

The Order

[43] Accordingly, the following order is granted:

43.1. The order by Makaula ADJP of 19 May 2023, separating the issue liability (as pleaded paragraphs 1 to 19 of the particulars of claim) from the issue quantum (as paragraphs 20 to 24 of the particulars of claim), is varied so that reference therein to "paragraphs 1-19" shall read "paragraphs 1-23" and reference therein to "paragraphs 20-24" shall read "paragraphs 24-27".

43.2. The Defendant is liable for all such damages as the Plaintiff may prove in respect of his claim resulting from negligent medical treatment he received on 12 April 2017.

43.3. The Defendant shall pay the Plaintiff's costs of the hearing of the matter in respect of liability together with all reserved costs, if any, on scale B in terms of Rule 67A, together with interest thereon at the legal rate from a date 30 days after allocatur and/or agreement to date of payment, which costs will furthermore include:

43.3.1. the costs of the hearing on 22 and 23 January 2025 including the costs of counsel employed;

43.3.2. the costs of preparing for consultations together with the costs of consultations between Plaintiff's legal representatives, Plaintiff and Plaintiff's witnesses, if any;

[14] See, for example, *Transnet Ltd t/a Metrorail and Another v Witter* 2008 (6) SA 549 (SCA) at paras 14-19.

43.3.3. the costs of preparing for trial and of argument, if any; and

43.3.4. the reservation fees, if any, together with the qualifying/preparation fees, if any, of the Plaintiff's expert witness, Professor Vlok, together with the travelling and accommodation costs, if any, in respect of Professor Vlok.

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C D KOTZÉ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING **:** 22 and 23 January 2025

DATE OF JUDGMENT **:** 6 May 2025

Appearances:

For the Plaintiff : Adv H B Ayerst instructed by DSSG Attorneys and Conveyancers, 3 Bidwell Street, Canon Hill, Uitenhage (ref: FAS/BK/SS9791).

For the Defendant : Adv I Dala SC instructed by The Office of the State Attorney, 29 Western Road, Central, Port Elizabeth (ref. L Potgieter-1968/2019/C).